ABU SAMAH OTHMAN

v.

ORIENTAL ASSEMBLERS SDN BHD

HIGH COURT MALAYA, JOHOR BAHRU
SYED AHMAD HELMY J
[JUDICIAL COURT NO: [MT-1] 25-39-2005]
19 OCTOBER 2006

ADMINISTRATIVE LAW: *Remedies - Certiorari - Application for certiorari to quash award of Industrial Court - Whether IC's finding tainted with unreasonableness - Whether decision irrational warranting court's intervention - Whether punishment meted out disproportionate*

ADMINISTRATIVE LAW: *Dismissal - Industrial Court - Decision - Upholding dismissal - Whether unreasonable - Whether irrational warranting court's intervention - Whether punishment meted out disproportionate*

LABOUR LAW: *Industrial Court - Decision - Upholding dismissal - Whether unreasonable - Whether decision irrational warranting court's intervention - Whether punishment meted out disproportionate*

LABOUR LAW: *Employment - Dismissal - Whether punishment of dismissal proportionate to alleged offence*

LABOUR LAW: *Employment - Dismissal - Alleged offence - Disrupting superior's instructions - Use of harsh and insulting words on supervisor - Whether proved - Whether dismissal justified*

This was an application by the applicant by way of judicial review for an order of *certiorari* to quash the award no. 1928 of 2005 made by the Industrial Court in upholding the dismissal of the applicant on grounds of misconduct. The applicant was employed by the respondent as a production operator in the sub frame engine assembly department. The applicant was dismissed after a domestic inquiry held by the respondent found him guilty of both charges (i) that he had intentionally disrupted his superior's instructions in ordering a new worker to do the work he was entrusted to do which was contrary to the instructions of his superior and (ii) he had used harsh and insulting words on his section supervisor. It was the applicant's contention that based on the totality of the evidence adduced, the industrial court's decision in upholding the dismissal was unreasonable and the punishment

A meted out was disproportionate to the offence that it merits the court's intervention herein. The question arose as to whether in the light of the totality of evidence adduced the conclusion of the Industrial Court was laced with unreasonableness so as to suffer from infirmity on the ground of irrationality.

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Held (allowing the applicant's application):

(1) The essence of the first charge related to disrupting the superior's instructions but the Industrial Court in finding it held that it was insubordination. This finding clearly bordered
C on unreasonableness as insubordination was never an issue. Since the reason given by the respondent was the disruption of the superior's instructions by the applicant's act of ordering the new worker to execute his work and in the face of the testimony on oath by the applicant refuting the same it clearly
D fell squarely within the respondent to prove the reason aforesaid by calling upon the new worker to testify to assist the Industrial Court in discharging its duty of enquiring whether the reason had or had not been made out. In the absence of the new worker's testimony the Industrial Court's
E finding must invariably be tainted with unreasonableness and consequently suffered from infirmity on the ground of irrationality. The admissions made in submission was of no significance if the evidence adduced did not support the same. (para 13)

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(2) On the second charge of using harsh and insulting words which though denied by the applicant was found to be insubordination by the Industrial Court, the basis of the Industrial Court's conclusion was his uncritical acceptance of
G the testimony of company's witnesses without giving weight to the applicant's denial and his health condition of suffering from diabetes and hypertension which led him to respond in the manner he did. The company's witnesses have self serving interest and to accept the same uncritically would again be
H unreasonable so as to make the decision irrational which warranted the court's intervention. (para 14)

(3) The punishment meted out was disproportionate to the alleged offence and bearing in mind that the applicant had been
I working for the respondent for nine years and there was no complaint about his work performance, the punishment of dismissal was rather harsh. (para 17)

[Case remitted back to the Industrial Court for consequential orders.]

Case(s) referred to:

Council of Civil Service Unions & Ors v. Minister For Civil Service [1985] AC 374 ***(refd)***

Kamala Loshanee Ambalavanar v. Jaffnese Co-Operative Society [1998] 7 MLJ 61 ***(refd)***

Kumpulan Perangsang Selangor Berhad v. Zaid Hj Mohd Noh [1997] 2 CLJ 11 FC ***(refd)***

Menara PanGlobal Sdn Bhd v. Arokianathan Sivapiragasam [2006] 2 CLJ 501 CA ***(refd)***

Milan Auto Sdn Bhd v. Wong Seh Yen [1995] 4 CLJ 449 FC ***(refd)***

Rama Chandran v. Industrial Court of Malaysia [1997] 1 CLJ 147 FC ***(refd)***

Ricwil (Malaysia) Sdn Bhd v. Tham Chai Wan [2004] 3 ILR 293 ***(refd)***

Sunmugam Subramaniam v. JG Container (M) Sdn Bhd & Anor [2000] 6 CLJ 521 HC ***(refd)***

For the applicant - Mathews George; M/s Mathews George & Co
For the respondent - Gana Muthusamy; M/s Gana Muthusamy & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Syed Ahmad Helmy J:

[1] This is an application by the applicant by way of judicial review for an order of *certiorari* to quash the award No. 1928 of 2005 made by the Industrial Court on 7 July 2005 pursuant to Industrial Court Kes No. 16/4 – 145/02 in Johor Bahru in upholding the dismissal of the applicant on grounds of misconduct.

[2] The applicant was employed by the respondent as a production operator holding the post of Assembler Grade 3 in the Sub Frame Engine Assembly Department.

[3] The applicant was dismissed on 25 June 2001 after a domestic inquiry held by the respondent found him guilty of both charges – the first being that on 20 June 2001 at 8.15am he intentionally disrupted his superior's instructions in ordering a new worker Halil bin A. Rashid to do the work which he was entrusted to do which is contrary to the instructions of his superior and the second being that on 20 June 2001 at about 1.45pm he used harsh and insulting words on his section supervisor Sam Cha Peng.

[4] It is the applicant's contention that based on a totality of the evidence adduced the Industrial Court's decision in upholding the dismissal is unreasonable and suffers from irrationality and the punishment meted out is disproportionate to the offence that it merits the court's intervention herein.

[5] It is appropriate at this juncture to state that though in essence judicial review is concerned not with the decision but with the decision making process nevertheless its scope has been radically altered by the Federal Court decision of *Rama Chandran v. Industrial Court of Malaysia* [1997] 1 MLJ 145 in that a court exercising judicial review has the power to review the decision of the Industrial Court on its merits, quash it by *certiorari* and substitute the decision of the Industrial Court with a different decision. As was aptly put by Gopal Sri Ram JCA in *Kumpulan Perangsang Selangor Berhad v. Zaid bin Mohd. Noh* [1997] 2 CLJ 11 at p. 23:

> ... the fallacy of the doctrine that judicial review is always confined to the decision making process and never with the merits of the decision was exploded by the land mark decision of the Federal Court in *R. Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147.

[6] In *Council of Civil Service Unions & Ors v. Minister For Civil Service* [1985] AC 374 it was held that a decision susceptible to judicial review is not only open to challenge on the ground of procedural impropriety but also on the grounds of illegality and irrationality.

[7] It is significant to emphasize that when a decision of the Industrial Court is tainted by wednesbury unreasonableness irrationality becomes a ground for judicial review.

[8] In approaching the application herein I am minded of the function and duty of the Industrial Court as stated by Mohd. Azmi FCJ in *Milan Auto Sdn. Bhd. v. Wong Seh & Yen* [1995] 4 CLJ 449 at pp. 454-455:

> As pointed out by this Court recently in *Wong Yuen Jock v. Jong Leong Assurance Sdn. Bhd.* [1995] 2 MLJ 753 the function of the Industrial Court in dismissal cases on a reference under s. 20 is two fold, first to determine whether the misconduct complained of by the employer has been established and secondly whether the proven misconduct constitutes just cause or excuse for the dismissal.

[9] Hence the duty of the Industrial Court does not stop upon finding that the employer has proved the misconduct but goes further to consider whether the punishment imposed is justified.

[10] Having laid down the legal position aforesaid I shall now allude to the facts as borne out by the notes of proceedings and the award of the Industrial Court to determine whether the Industrial Court has scrupulously adhered to its twin functions aforesaid.

[11] From the notes of proceedings the respondent called five witnesses to substantiate its case of dismissal by misconduct through the two charges. The applicant testified on his own behalf denying that he ordered the new worker to do the work entrusted to him as he only requested the new worker to assist him but was refused by the assistant supervisor and he denied using harsh and insulting words. The conclusions of the learned Chairman which appears at pp. 6 to 7 and 12 of his grounds of award are reproduced as follows:

> Mengenai pertuduhan pertama, setelah menimbang keterangan COW1, COW2 dan COW4 mahkamah berpuas hati bahawa kerja yang dibuat oleh yang menuntut itu sememangnya boleh dibuat oleh seorang pekerja sahaja tanpa perlu dibantu. Syarikat menganggapkan perbuatan mengarah pekerja lain bagi membantunya sebagai salah laku kerana pihak menuntut tidak ada bidang kuasa berbuat demikian dan perbuatan tersebut telah mengganggu rancangan dan jadual kerja yang telah diatur pada pagi tersebut. Mahkamah berpendapat pertuduhan ini telah terbukti.
>
> Mengenai pertuduhan kedua setelah menimbangkan pengakuan yang menuntut dalam siasatan dalaman bahawa beliau ada mengeluarkan kata-kata tersebut, dan setelah menimbangkan pengakuan yang menuntut yang telah disahkan oleh peguam dalam penghujahannya mahkamah berpendapat bahawa pertuduhan kedua juga telah terbukti.
>
> Pada pendapat mahkamah dalam konteks kes ini apabila seorang pekerja menyebut perkataan "tidak ada otak" ia merupakan kata-kata kasar dan kata-kata yang merupakan suatu penghinaan. Perkataan ini tidak sepatutnya disebut oleh seorang pekerja terhadap ketuanya. Oleh yang demikian seperti yang dinyatakan oleh otoriti di atas dan dalam konteks kes sekarang adalah jelas merupakan suatu kesalahan insubordination.

A **[12]** The question thus arises whether in the light of the totality of evidence adduced the conclusion of the Industrial Court is laced with unreasonableness so as to suffer from infirmity on the ground of irrationality.

B **[13]** Now it cannot be disputed that the essence of the first charge relates to disrupting the superior's instructions but the Industrial Court in finding it proved held that it was insubordination. This finding is to my mind puzzling and clearly borders on unreasonableness if not unreasonable as insubordination C was never an issue. Since the reason given by the respondent was the disruption of the superior's instructions by the applicant's act of ordering the new worker to execute his work and in the face of the testimony on oath by the applicant refuting the same it clearly falls squarely within the respondent to prove the reason D aforesaid by calling upon the new worker to testify to assist Industrial Court in discharging its duty of enquiring whether the reason has or has not been made out. In the absence of the new worker's testimony the Industrial Court's finding must invariably be tainted with unreasonableness and consequently suffers from E infirmity on the ground of irrationality. It is also pertinent to emphasize the admissions made in submission is of no significance if the evidence adduced does not support same.

[14] Again on the second charge of using harsh and insulting F words which though denied by the applicant was found to be insubordination by the Industrial Court. The basis of the Industrial Court's conclusion was his uncritical acceptance of the testimony of company's witnesses without giving weight to the applicant's denial and his health condition of suffering from diabetes and G hypertension which led him to respond in the manner he did. It must be appreciated that the company's witnesses have self-serving interest and to accept same uncritically would again be unreasonable so as to make the decision irrational which warrants the court's intervention.

H **[15]** Though it is true that past misconduct for which punishment has been meted out is a factor for consideration as condonation is conditional forgiveness – see *Kamala Loshanee a/p Ambalavanar v. Jaffnese Co-operative Society* [1998] 7 MLJ 61 – nevertheless in the factual matrix herein the past misconduct had nothing to do I with the usage of insulting words and hence to my mind it cannot be a factor for consideration.

[16] Again on the principles of judicial review as laid down by the Court of Appeal decision in *Menara PanGlobal Sdn. Bhd. v. Arokianathan a/l Sivapiragasam* [2006] 2 CLJ 501 same is distinguishable in that it did not take into account the Federal Court decision of *Ramachandran (supra)* and also it did not touch on the issue of proportionality of sentence.

[17] In any event to my mind the punishment meted out is disproportionate to the alleged offence and bearing in mind that the applicant had been working for the respondent for nine years and there was no complaint about his work performance the punishment of dismissal is rather harsh – see *Sunmugam Subramaniam v. JG Container (M) Sdn. Bhd. & Anor* [2000] 6 CLJ 521; *Ricwil (Malaysia) Sdn. Bhd. v. Tham Chai Wan* [2004] 3 ILR 293.

[18] The upshot of it all is that the applicant's application is allowed with costs and the case is remitted back to the Industrial Court for consequential orders.